STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2007
v	No. 265840 Oakland Circuit Court
ANTHONY DUANE WOODS, Defendant-Appellant.	LC No. 2005-202506-FH

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a); carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to three to fifteen years' imprisonment each for his fleeing and eluding, carrying a concealed weapon, and felon in possession convictions, and to two years' imprisonment for his felony firearm convictions. We affirm.

On the night of April 23, 2005, Officer Joseph Miller attempted to stop a van with a broken taillight. Instead of stopping when Officer Miller activated the overhead police car lights, the van's driver, defendant, "took off." Officer Miller followed the van at high speeds through several blocks of a residential area. The van suddenly turned into a driveway, the driver's side door opened, and, while the van was still moving at about 35 m.p.h., defendant jumped from the van and ran from the scene. The van crashed into the garage at the end of the driveway. Officer Miller followed defendant on foot, and he was apprehended several blocks away.

After defendant was arrested, the van was towed to an impound lot, in keeping with the policy of the local police department. Although it was also department policy to perform an inventory search before a vehicle was impounded, Officer Miller failed to do so because he errantly assumed that other officers had already completed an inventory search. The van could not be secured at the impound lot because the driver's-side window was broken out. Therefore, following his own company's policy, the tow-truck driver began to inventory and collect the van's contents. While doing so, he discovered a pistol on the floor of the passenger side and called the police. In response to that call, Officer Miller went to the impound lot and found a nine-millimeter pistol on the floor of the van. He then completed a full inventory search.

Defendant first argues on appeal that the trial court erred by excluding defendant from a discussion regarding a supplemental instruction to the jury during deliberation. Defendant claims that his absence from the courtroom violated his constitutional right to be present at all phases of his trial. We agree with defendant that the trial court should not have discussed and issued the instruction in defendant's absence, but we disagree that the error requires reversal. While the jury was deliberating, it sent the trial court a note asking it to define "taking part," one of the elements of the crime of carrying a concealed weapon. The trial court consulted with defense counsel and the prosecution. Defendant, however, remained in the prisoner holding area during the discussion. The trial court then provided an instruction, which appears to have been approved by both attorneys, stating "[i]t is for the jury to decide what the facts of this case are and to apply the law to the facts. It is for the jury to decide what the meaning of 'taking part' is within the context of the entire jury instructions."

Nothing before us demonstrates that defendant waived his right to be present, so we presume that defendant did not waive his rights. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Defendant correctly argues that he had a constitutional right to be present when the instructions were provided. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). Every absence, however, is not a violation of due process and grounds for automatic reversal; "it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial." *People v Morgan*, 400 Mich 527, 535; 255 NW2d 603 (1977). Rather, the test for whether the absence is an error requiring reversal is whether there is any reasonable possibility that the defendant's absence prejudiced him. *Id*. at 536.

When a communication with the jury outside of defendant's presence is of a substantive nature, which includes supplemental instructions on the law, prejudice is presumed and "may only be rebutted by a firm and definite showing of an absence of prejudice." *People v France*, 436 Mich 138, 143; 461 NW2d 621 (1990). Once a defendant objects to an instruction given in his absence, the prosecutor must demonstrate that the instruction was not prejudicial. *Id*. at 143-144. Here, the trial court's instruction essentially restated the original instructions and merely redirected the jury to the facts of the case and application of the law. Moreover, defense counsel was present and approved the instruction, so the presumption that the instruction prejudiced defendant has been effectively rebutted. *Id*. at 164-165. We also note that ordinarily defense counsel fully represents a defendant's interest and may exercise the privileges that defendant could have exercised. *People v Carroll*, 396 Mich 408, 413; 240 NW2d 722 (1976). Here, defendant was represented and counsel exercised defendant's right to participate in the pre-instruction discussion, so defendant's absence did not prejudice him or undermine the reliability of the jury's verdict. *France*, *supra*. Because we find no prejudice from defendant's absence during the instruction, we will not reverse on this basis.

Defendant next argues on appeal that his motion to suppress the pistol found in the van was wrongly denied because the pistol was the fruit of an illegal search. We will not disturb a trial court's findings of fact when deciding a motion to suppress unless the findings are clearly erroneous. *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996).

Defendant argues that because he was lawfully in possession of the van and only left it temporarily, he has standing to challenge the search. We disagree. The first inquiry in approaching this standing question is whether defendant had a legitimate expectation of privacy in the contents of the crashed and abandoned van. *People v Mamon*, 435 Mich 1, 6; 457 NW2d

623 (1990) (Riley, C.J.). Ordinarily, a defendant may not challenge the search and seizure of abandoned property, because the property's abandonment destroys the possessor's interest in it. *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002). A defendant abandons his property when he discards it. *Mamon, supra* at 7. In this case, defendant jumped from the van while it was still moving. He left it crashed into a garage with the lights on, the door open, and the keys in the ignition. He never tried to return to the van and was apprehended several blocks away. Although he may not have wanted to relinquish his legal interests, he certainly shed the van when it served his more immediate interest of escape. He also admitted that he fled from the van because he did not want to be connected with the gun inside. By jumping out of the open van and running, defendant abandoned the van to search by the owner of the home, the tow company, and certainly the police. The trial court correctly held that defendant abandoned his expectation of privacy and lacked standing to challenge the search of the van, so the denial of defendant's motion to suppress was not error. Moreover, defendant fails to establish how the tow truck driver's search of the automobile, or the police search it later prompted, could possibly reach the level of an "unreasonable search and seizure" of the demolished van and its contraband. See *People v McKendrick*, 188 Mich App 128, 141-142; 468 NW2d 903 (1991); *Michigan v Thomas*, 458 US 259; 102 S Ct 3079; 73 L Ed 2d 750 (1982).

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot